MADURASINGHE
V.
MADURASINGHE

SUPREME COURT,
RANASINGHE C.J.,
H.A.G. DE SILVA, J. AND,
BANDARANAYAKE, J.,
S.C. APPEAL NO. 71/86.
C.A. NO. 408/78 (F).
D.C. GAMPAHA - 16946/L.
MAY 25, 1988

Declaration of title and ejectment — Compensation — Jus retentionis — Nomination as successor — Land Development Ordinance ss. 60 and 72 — Lex non cogit ad impossibilia-Principle of nunc pro tunc.

One Marthina Hamine was the owner of the lands in suit and they were sold in execution of a mortgage decree. She applied under the provisions of the Land Redemption Ordinance No. 61 of 1942 to the Land Commissioner for their redemption in 1945 but she died during the pendency of the proceedings. Her husband Haramanis Perera continued the proceedings and the land was acquired by the Crown and possession thereof handed over to him in 1955. On 12.11.1956 Haramanis executed a document nominating the defendant (Meraya) as his successor after his death in the presence of the D.R.O. who signed as a witness. The defendant married in 1954 and Haramanis lived with her and her husband until his death on 29.01.1960. After the nomination, Haramanis delivered possession of these lands to the defendant and her husband began improving the land. The defendant enjoyed the produce of these lands. In August 1961 the defendant received two grants in respect of these lands duly registered and on 26.08.1961 she nominated her son Susantha Jayaweera as her successor reserving life interest to herself. This nomination was duly registered under the provisions of the Land Development Ordinance in 1968. Her own nomination as successor to her father Haramanis was registered only on 10.01.1970 long after her father's death after the Attorney-General advised the Land Commissioner that he could register her nomination nunc pro tunc.

On 16.01.1962 the Land Commissioner by a document marked in the case recognised Edmund Peter, Haramanis's eldest child by the second marriage as the legal successor to Haramanis in respect of these lands and he entered into possession of these lands. The plaintiff claimed the nomination was invalid in view of s. 60 of the Land Redemption Ordinance whereby nomination had to be duly registered before the death of the owner of the holding or the permit holder. The Court of Appeal held that the plaintiff was entitled to the land and defendant should be evicted but as defendant was a bona fide improver she was entitled to compensation and a jus retentionis until payment of compensation.

Held:

(1) The defendant cannot rely on the maxim *lex non cogit ad impossibilia* (same as impotentia excusat legem) because she failed to get her own nomination registered while she got the nomination of her son registered in 1968. The maxim will not apply if the necessity was created by the act of the person relying on it or where all practical endeavours have not been used to surmount it and where the clearest proof that the necessity compelled the violation is not there.

(2) The principle *nunc pro tunc* (now for then) is really an application of the principle *actus curiae neminem gravabit* – the act of the court will prejudice no man and is founded upon justice and good sense. This maxim is applicable in cases of delay by courts and not delays by administrative action.

APPEAL from judgment of the Court of Appeal.

Faiz Mustapha P.C. with *H. Withanachchi* for defendant - Appellant

J. de Almeida Gunaratne for plaintiff-respondent.

Cur. adv. vult.

September 01, 1988

DE SILVA, J.

The plaintiff-respondent instituted this action in the District Court of Gampaha, against the defendant-appellant, his half-sister, seeking a declaration that he was entitled to two allotments of land called Delgahalanda and referred to in the Schedule to the plaint. In addition he sought an ejectment of the defendant therefrom and damages of Rs. 2,400/— in respect of the two years the defendant was in unlawful possession and at Rs. 100/— per month till he is placed in quiet possession thereof. After trial the learned District Judge dismissed the plaintiff's action with costs.

The plaintiff thereupon filed an appeal to the Court of Appeal and the latter Court by its judgment, set aside the judgement of the District Court and entered judgment, declaring the plaintiff entitled to the land in question, and for a writ of ejectment of the defendant. It also held that the defendant as the bona fide improver of the land was entitled to compensation from the plaintiff for the improvements and to a jus retentionis till such compensation was paid. The case was also remitted back to the District Court for the ascertainment of the quantum of compensation payable to the defendant for the improvements.

From the judgement of the Court of Appeal the defendant has appealed to this Court, with leave of that Court on the following three questions viz:-

(1). Whether the finding of the Court of Appeal that the admission of the defendant in paragraph 18 of her affidavit P9 determines the question whether the plaintiff was the eldest surviving son of Haramanis Perera at the time of Haramanis's death.

(2) Whether the nomination of the defendant as successor having been registered after the death of Haramanis Perera renders such nomination invalid in terms of Section 60 of the Land Development Ordinance considering the circumstances of this case.

(3) Whether the amendment to Section 72 of the Land Development Ordinance by Act No. 16 of 1969 can have retrospective effect.

At the hearing of this appeal learned Counsel for the defendant-appellant submitted that he would not be canvassing the Appeal Court judgment in respect of the third question formulated for our determination and hence it will not be necessary for me to deal with it. We are therefore left with two questions for decision, the first being whether the admission of the defendant in paragraph 18 of the affidavit P9, which was filed by her in an application for a Writ of Mandamus made by the present plaintiff against inter alia the present defendant determines the question whether the plaintiff is the eldest surviving child of Haramanis. In that application the present plaintiff had averred in paragraph 5 of his petition that Haramanis Perera (his father) had died on 29.1.1960 leaving surviving him the following children, his wife having predeceased him, viz. the plaintiff/petitioner being a child of the first marriage and five children of the second marriage including the defendant, the 3rd respondent to that application. What was significant was that the plaintiff/petitioner had not included in the list of children in that averment the name of Richard Perera the eldest child of Haramanis by his first marriage.

It was the evidence of the plaintiff and his witness Edmund Peter, a full brother of the defendant, and the eldest child of Haramanis by his second marriage, that Richard was not married and had left the residing house about 30 years ago and the information received was that Richard was dead; that Richard had not attended his father's or mother's funeral nor the marriages of any of his sisters. On the other hand the defendant contended that the plaintiff's and his witness's evidence that Richard was dead, was not true as she had seen Richard in his father's house in 1961. The learned District Judge had held that that evidence relied on by the plaintiff to prove Richard's death was contradictory and hence rejected it.

The Court of Appeal stated that while there was no doubt that there were certain contradictions in the evidence of the plaintiff and his witness Edmund Peter, there was also an important admission by the defendant which the learned District Judge had not taken into consideration viz: the admission by the defendant in para 18 of P9 in which she stated—

> "I admit the averments contained in paragraphs 1,3,4,5, (except the date of death of my father) 10 and 13 of the affidavit of the petitioner abovenamed".

The Court of Appeal therefore held that by admitting para 5 of the petition in which Richard's name as one of the surviving sons of Haramanis Perera had been omitted, the defendant had thereby admitted that he was no longer living and that the plaintiff/petitioner was his eldest surviving child by the first marriage. In these circumstances, the Court of Appeal held that the burden shifted to the defendant to prove that Richard was living, which it was stated the defendant had failed to do and hence it could be presumed that Richard was dead and the plaintiff was the eldest surviving child of Haramanis Perera.

Learned Counsel for the defendant submitted that though there was such a situation created by the inclusion of paragraph 5 in the admissions contained in paragraph 18 of the defendant's affidavit P9, in paragraph 19 of her affidavit she had

denied inter alia the averments contained in paragraph 7 of the petition wherein the plaintiff/petitioner had averred that he was the eldest surviving male child of Haramanis Perera at the date of his death. 29.1.1960. We therefore have two positions taken up by the defendant in her affidavit contradictory of each other. While one would be able to say that the effect of the admission of the averments of paragraph 5 of the petition is an admission that the plaintiff/petitioner was the only surviving child of the first marriage and hence the other child Richard who was elder to him was dead, it was an admission of the death of Richard by necessary implication, the denial of the averment in paragraph 7 of the petition was also a denial by implication that Richard was dead or put in other words an assertion by implication that Richard was alive and hence the plaintiff/petitioner was not the eldest surviving male child of Haramanis Perera. In this state of affairs it is my view that one cannot fault the view taken by the Court of Appeal because if it was the defendant's position that Richard was alive, she could have made a positive averment to that effect. I would therefore prefer not to interfere with the conclusions arrived at, by the Court of Appeal on this matter.

There remains to be answered the second question viz: whether the nomination of the defendant as successor having been registered after the death of Haramanis Perera is rendered invalid by Section 60 of the Land Development Act.

The facts elicited at the trial disclose that Haramanis Perera, the father of both the plaintiff and the defendant was placed in possession of lands in question on 28th February 1955. The manner in which he became possessed of these lands was that his second wife and mother of the defendant, Kahandana Aarachchige Dona Marthina Hamine was the owner of those lands. These lands had been sold under a mortgage decree entered against her in DC Colombo Case No. 7780/M.R. Marthina Hamine being entitled to apply under the provisions of the Land Redemption Ordinance No. 61 of 1942, duly applied to the Land Commissioner for their redemption in 1945 but she died before the proceedings were concluded.

Haramanis Perera, her husband, however continued the proceedings and the lands were acquired by the Crown and possession thereof handed over to him in 1955.

On 12th November 1956, Haramanis Perera went to the office of the Divisional Revenue Officer, Siyane Korale West (Medu Pattu) Imbulgoda and in the presence of the D. R. O. he executed a document nominating the defendant as his successor to the lands after his death and the D. R. O. signed as a witness.

The defendant who was unmarried at the time of her mother's death, married in 1954 and Harmanis Perera lived with the defendant and her husband until his death on 29th January 1960. After the defendant was nominated as his successor Haramanis Perera delivered possession of those lands to the defendant, and her husband began improving the land by planting coconuts etc. at their expense. The defendant was in possession of the lands and she enjoyed the produce of the lands. In August 1961 the defendant received the two grants P1 and P2 in respect of these lands duly registered and on 26th August 1961 she nominated her son Meegodage Lokitha Susantha Jayaweera as her successor with herself as the life-holder. This nomination has been duly registered under the provisions of the Land Development Ordinance in 1968. Her own nomination as the successor to her father was registered only on 10th January 1970 nearly 10 years after her father's death.

On 16th January 1962 by P3 the Land Commissioner has recognised Edmund Peter, Haramanis's eldest child by the second marriage as the legal successor to Haramanis Perera in respect of these lands and he entered into possession thereof.

For the first time the Land Commissioner, after receipt of the Attorney-General's advice by P14 on 28th March 1967, that the plaintiff's claim to the land could be accepted, has on 20th May 1968 sought a review of that advice by P15 stating that Haramanis Perera had nominated his daughter before his death. Following this letter the Attorney-General changed his earlier view and expressed a re-considered view in D8 of 12th August 1968, that in the special circumstances of this case it was possible to take the view that the nomination made by Haramanis Perera of his daughter the defendant is a valid one notwithstanding that the formal grant was issued later and advised the Land Commissioner to register that nomination

nunc pro tunc and recognise the defendant as the duly nominated successor of Haramanis Perera. This nomination, as stated earlier was registered therefore only in 1970.

It was the plaintiff's contention that in view of the provisions of Section 60 of the Land Development Ordinance as amended by Act No: 16 of 1969 which states that "no nomination ..... of a successor shall be valid unless the document (other than a last will) effecting such nomination ..... is duly registered before the death of the owner of the holding or the permit-holder", the nomination of the defendant, if there be such a nomination is of no effect and does not pass title to her. To overcome this obstacle, learned Counsel for the defendant has called into aid two legal maxims viz: (1) lex non cogit ad impossibilia and (2) the principle of nunc pro tunc. I will first deal with the first legal maxim and its application to the facts of this case.

Broome's Legal Maxim's page 197 states that "lex non cogit ad impossibilia" is the same as the maxim impotentia excusat legem". This maxim means "impossibility is an excuse for non-compliance with an absolute provision". It goes on to say "impotentia" excuses when there is a necessary or invincible disability to perform the mandatory part of the law or to forbear the prohibitary. In the performance of that duty it has three points to which its attention must be directed. Firstly it must see that the nature of the necessity pleaded be such as the law itself would respect. A necessity created by a man's own act, with a fair previous knowledge of the consequences that would follow and under circumstances which he then had a power of controlling, is of that nature. Secondly, that the party who was so placed, used all practical endeavours to surmount the difficulties which already formed that necessity and which on fair trial he found unsurmountable. Thirdly, that all this shall appear by distinct and unsuspected testimony for the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation".

Craies on Statute Law, 7th edition states at page 265 —

> "under certain circumstances compliance with the provisions of statutes which prescribes how something is to

be done will be excused, i.e if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons intended had no control, like the act of God, or the King's enemies, these circumstances will be taken as a valid excuse".

Maxwell on Interpretation of Statutes, 12th edition page 326 says —

"Enactments which impose duties upon or conditions are, when these are not construed as conditions precedent to the exercise of a jurisdiction, subject to the maxim "lex non cogit ad impossibilia". They are understood as dispensing with the performance of what is prescribed when performance of it is impossible".

According to the material available, possession of the lands were handed over to Haramanis Perera in 1955. In November 1956 he is alleged to have made the nomination but even at that time the formal grants had not been issued to him and were not issued even up to the date of his death January 1960. The defendant received the grants only in August 1961. There is no evidence to show that either Haramanis Perera or the defendant his nominee took any steps to obtain the formal grants even up to 1961. The defendant then on 26th August 1961 nominated her son and she got that nomination registered in 1968 but failed to get her own nomination registered even at that stage. It was only in 1970, two years after the Attorney-General by D8 had expressed a re-considered view that the defendant submitted the original nomination of herself for registration. Even if one could say that till 1961 she could not register the nomination due to an absence of the formal grants and their being duly registered, there is no excuse for her waiting another 9 years to get the registration done. Since the nomination was made even before the formal grants were issued, I do not see any reason why the nominations could not be registered before such issue, because these lands had been the subject matter of transactions even during the lifetime of the defendant's mother. In these circumstances, even if this maxim could be applied to a situation where a nomination had not been registered during the lifetime

of the owner, in compliance with the mandatory requirement of Section 60, I do not think that in the circumstances of this case, the application of that maxim is justified.

The next matter that calls for consideration is the principles of "nunc pro tunc" which is really the application of the maxim "Actus curiae neminem gravabit" — An act of the Court shall prejudice no man". Broome's Legal Maxims 7th edition page 97 reads; "this maxim is founded upon justice and good sense; and affords a safe and certain guide for the administration of the Law". In virtue of it, where a case stands over for argument on account of the multiplicity of business in the Court, or for judgment from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively to meet the justice of the case; and, therefore, if one party to an action dies during a curia advisari vult, judgment may be entered nunc pro tunc, for the delay is the act of the Court, for which neither party should suffer". ". . . . . It may be here mentioned that the power of the Court to enter judgment nunc pro tunc does not depend upon statute. It is a power of common law, and, in accordance with the ancient practice of the Court, is adopted in order to prevent prejudice to a suitor from delay occasioned by the act of the Court. Where, however, the delay is not attributable to the act of the Court, the above maxim does not apply".

A study of the treatises on Interpretation of Statutes and Law Lexicons drive me to the conclusion that this maxim is applicable in cases of delay by Courts and not in administrative actions. In any event the registration of the nomination of the defendant as a successor could be considered only if the other maxim "lex non cogit ad impossibilia" could be applied and I have already held that the latter maxim is not applicable in the circumstances of this case. Accordingly the question of the application of the principle of nunc pro tunc does not arise in this instance. I would therefore hold that the defendant has failed on both matters agitated before this Court. I affirm the judgment of the Court of Appeal and dismiss the defendant's appeal with costs.

RANASINGHE, C.J. — I agree.
BANDARANAYAKE, J. — I agree.
Appeal dismissed.